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March 27, 2020

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**Re: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's
Response to NCCEBA/NCSEA's Joint Notice of Additional Authority
Docket No. E-100, Sub 158**

Dear Ms. Campbell:

Enclosed for filing in the above-referenced docket is Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response to NCCEBA/NCSEA's Joint Notice of Additional Authority.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Kendrick C. Fentress

Enclosure

cc: Parties of Record

OFFICIAL COPY

Mar 27 2020

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, SUB 158

In the Matter of)	DUKE ENERGY CAROLINAS,
Biennial Determination of Avoided Cost)	LLC AND DUKE ENERGY
Rates for Electric Utility Purchases from)	PROGRESS, LLC'S RESPONSE
Qualifying Facilities – 2018)	TO NCCEBA/NCSEA'S JOINT
)	NOTICE OF ADDITIONAL
)	AUTHORITY
)	

NOW COME Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP,” and together with DEC, “Duke” or the “Companies”) and hereby respond to the Notice of Additional Authority (“Notice”) filed jointly by the North Carolina Clean Energy Business Alliance (“NCCEBA”) and the North Carolina Sustainable Energy Association (“NCSEA”) in this docket on March 16, 2020. The Companies respectfully request the Commission to strike the Notice because it impermissibly includes a legal argument by NCCEBA and NCSEA after the filing of proposed orders by the parties in this docket.

In support of the foregoing, the Companies show the Commission the following:

1. The procedural history of this matter has been detailed in numerous filings before this Commission, concluding with the filing of proposed orders in this matter on September 4, 2019. Relevant to this matter is the issue of DEC’s and DEP’s proposed clarification of its standard offer to include that a material alteration to an existing qualifying facility (“QF”) requires prior consent by DEC and DEP. The Companies first made this clarification to their standard offer in their Joint Initial Statement, filed November 1, 2018. Subsequently, the parties to this proceeding had the opportunity to address this issue through comments, reply comments, pre-filed testimony, cross-

examination at the evidentiary hearing, and, as acknowledged by NCCEBA/NCSEA, proposed orders and post-hearing briefs.

2. On January 2, 2020, the Public Service Commission of South Carolina (“SC PSC”) issued an *Amended Order Approving Duke Energy Carolinas, LLC’s and Duke Energy Progress, LLC’s Standard Offer Tariffs, Avoided Cost Methodologies, Form Contract Power Purchase Agreements, and Commitment to Sell Forms*, in Docket Nos. 2019-185-E and 2019-186-E, which are the DEC and DEP avoided cost dockets in South Carolina. (“South Carolina Order”). As NCCEBA/NCSEA recognized, the South Carolina Order is now pending reconsideration by the SC PSC.

3. NCCEBA/NCSEA have attached the South Carolina Order to their Notice as Attachment A and have additionally proceeded to include additional legal argument in support of their positions outlined in their Post-Hearing Brief.

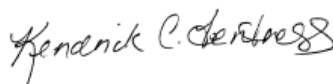
4. NCCEBA/NCSEA cite no legal authority justifying their late-filed legal argument, and indeed there is no Commission authority for allowing parties to supplement their Post-Hearing Briefs with additional legal argument through the guise of a Notice of Additional Authority. Although NCCEBA/NCSEA have not cited the North Carolina Rules of Appellate Procedure as authority for their appending an additional legal argument to their Post-Hearing Brief, N.C. R. App. P. Rule 28(g) (“Rule 28(g)”) provides guidance on how additional authorities may be brought to a court’s attention after briefing. Rule 28(g) provides that additional authorities discovered by a party after filing a brief may be brought to the attention of the court by a filing of a memorandum thereof. Significantly, Rule 28(g) further states that “the memorandum may not be used as a reply brief or

additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation to the authority.” (Emphasis added.)

5. Even if the Commission applied the letter and rationale of Rule 28(g) liberally in this matter, NCCEBA/NCSEA’s Notice still improperly exceeds its scope. NCCEBA/NCSEA’s Notice includes two paragraphs of legal argument intended to bolster the legal argument already included in their Post-Hearing Brief. They summarize the South Carolina Order on this issue and selectively cite portions of the South Carolina Order that they believe support their position. They even include actual citations to their Post-Hearing Brief that they believe align with the South Carolina Order. North Carolina courts have stated in response to a “purported ‘memorandum of additional authority’” that “[w]e caution the bar that it may not use a memorandum of additional authority as a reply brief or for additional argument. . . . Any summary of the authority or further argument is a violation of Rule 28(g).” *Whitaker v. Akers*, 137 N.C. App. 274, 281 (2000) (citations omitted). Indeed, the Commission has previously stricken purported filings submitting additional authority that “contain procedurally inappropriate supplemental argument.” *Recommended Arbitration Order*, at 3 Docket No. P-1141, Sub 1 (Nov. 27, 2002). NCCEBA/NCSEA’s Notice goes far beyond stating the issue and citing the authority, it instead summarizes the South Carolina Order on this issue and then makes additional legal argument. While the Commission may take judicial notice of determinations of other public utilities commissions, its findings and conclusions must be based upon material and substantial evidence in the record actually before it in deciding contested issues. *See* N.C. Gen. Stat. 62-65; *see also, Opinion Re Mid-Carolina Telephone Company, Inc.* Docket No. P-118, Sub 22 (June 2, 1982) (Taking judicial notice of other state public utility

commission decisions on an issue, but “find[ing] that the [Commission’s] decision as to the proper treatment of this issue must be based upon the evidence presented in this proceeding rather than be determined on court decisions rendered by other regulatory bodies”). As such, NCCEBA/NCSEA’s Notice should be stricken, and the Commission should decide the issues presented in this Docket based upon the extensive record before the Commission and without regard to NCCEBA/NCSEA’s characterization of the South Carolina Order.

Respectfully submitted, this the 27th day of March 2020.



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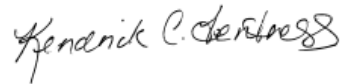
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CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Response to NCCEBA/NCSEA's Notice of Additional Authority, in Docket No. E-100, Sub 158 has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1st Class Postage Prepaid, properly addressed to parties of record.

This the 27th day of March, 2020.



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